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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

SEP 29 1997

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| In the Matter of | ) | |
| | ) | |
| Policy and Rules Concerning the | ) | CC Docket No. 96-61 |
| Interstate, Interexchange Marketplace | ) | CCB/CPD 97-54 |
| | ) | |
| Implementation of Section 254(g) of the | ) | |
| Communications Act of 1934, as amended | ) | |

## COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits its Comments in support of the Motion for Stay of Enforcement of PrimeCo Personal Communications, LP ("PrimeCo") filed with the Federal Communications Commission ("Commission") on September 23, 1997.[1] In its Motion for Stay, PrimeCo requests that the Commission stay the enforcement of its rate integration rule as it applies to Commercial Mobile Radio Service ("CMRS") carriers, and to carriers which they control or own, pending reconsideration or clarification of the Reconsideration Order in the above-referenced docket.[2] At a minimum, PrimeCo urges the Commission to stay the application of

[1] Public Notice, Expedited Pleading Cycle Established For PrimeCo's Motion For Stay Of Enforcement Of Rate Integration Requirements As Applied To CMRS Providers, CCB/CPD 97-54, DA 97-2086, rel. Sep. 25, 1997.

[2] Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, First Memorandum Opinion and Order on Reconsideration, FCC 97-269, rel. July 30, 1997 ("Reconsideration Order"). PrimeCo stated that it will file a petition for reconsideration and/or clarification as necessary to obtain relief from the Reconsideration Order.

the "affiliate requirement" in the CMRS context to avoid the far-reaching anti-competitive consequences such a requirement would have on CMRS carriers and their customers.

## I. THE COMMISSION SHOULD STAY ENFORCEMENT OF THE RATE INTEGRATION RULE AS APPLIED TO CMRS

U S WEST agrees with PrimeCo that there was insufficient record support for the Commission's decision to require integration of CMRS rates.[3] In its Reconsideration Order, the Commission held – without any substantive discussion of the need for integrating CMRS interstate interexchange rates or of the repercussions of such a requirement for CMRS carriers and their customers – that its rate integration rule applies to CMRS. In fact, the Commission's lone reference to integration of interstate CMRS rates appeared in the subordinate clause of a sentence clarifying that the rates for interstate interexchange CMRS do not have to be integrated with the rates for other interstate interexchange services.[4] As the PrimeCo Motion demonstrates, however, there are highly significant and compelling implementation issues that would be raised by CMRS rate integration, issues which were not addressed at all in the Reconsideration Order. The Commission's failure to solicit any comment, develop any factual record, or provide any explanation for its decision to extend its rate integration requirement to CMRS makes the decision legally unsupportable.[5] If the Commission truly desires to take

[3] PrimeCo Motion for Stay at 5.

[4] Reconsideration Order ¶ 18.

[5] PrimeCo Motion for Stay at 6.

the radical step of subjecting CMRS to its rate integration rule, then it is clearly necessary to analyze this decision carefully and to explain what the rule means.

In addition, the Commission's significant expansion of its existing rate integration policies to include CMRS is plainly inconsistent with the congressional intent underlying Section 254(g) of the Communications Act of 1934, as amended. As Congress made clear and the Commission itself acknowledged, the purpose of Section 254(g) was to "incorporate the Commission's existing rate integration policy."[6] The Commission had never before imposed any type of rate integration requirement on CMRS.[7] Congress certainly did not direct the Commission to diverge from its existing rate integration policies by requiring integration of CMRS rates – and the Commission may not claim that it has any mandate to do so under the guise of implementing Section 254(g).

Thus, the Commission has neither a statutory mandate for, nor a legally sufficient record to support, the imposition of rate integration requirements on the CMRS industry. The Commission should therefore stay the Reconsideration Order as it applies to CMRS, pending further proceedings to explore the legal and factual basis therefor.

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[6] Reconsideration Order ¶ 2 (citing S. Rep. No. 230, 104th Congress, 2d Sess. 1, 132 (1996) (Joint Explanatory Statement)).

[7] The Commission itself conceded that it has never required integration of interexchange CMRS rates with other interexchange services rates. Id. ¶ 18. Further, the Commission generally has declined to regulate CMRS rates in order to promote competition. See, e.g., In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411, 1510-11 ¶ 272 (1994).

## II. THE COMMISSION SHOULD, AT A MINIMUM, STAY ENFORCEMENT OF THE AFFILIATE REQUIREMENT

U S WEST also shares PrimeCo's concern that an overly broad application of the Commission's "affiliate requirement" could have serious anti-competitive effects that would be extremely disruptive to PrimeCo's and its owners' operations. In the Reconsideration Order the Commission held that rate integration is required across "affiliates" as that term is defined in Section 32.9000 of the Commission's uniform accounting rules.[8] This "affiliate requirement" was not mandated by the express language of the statute, but rather was created by the Commission. Taken to the extreme, the definition of "affiliate" contained in the Reconsideration Order could be interpreted as requiring PrimeCo to integrate its rates with those of its three owners – U S WEST, Bell Atlantic, and AirTouch. Each of these owners, in turn, would have to meet and agree to charge identical rates for their respective CMRS interexchange interstate services. As PrimeCo demonstrated, such a result would raise serious affiliate compliance problems that spiral outward in an expanding "daisy-chain."[9]

If, as PrimeCo fears, the Commission applies its rate integration rule broadly across all of PrimeCo's owners, there will be severe anti-competitive consequences for PrimeCo, U S WEST and the other PrimeCo owners, and their customers. Not

[8] 47 C.F.R. § 32.9000. U S WEST had pointed out in its Petition for Clarification, or, in the Alternative, Reconsideration filed herein Sep. 16, 1997, that application of the rate integration rule to entities with "targeted stock" affiliates was likewise erroneous. This issue can be dealt with in an orderly appellate process.

[9] PrimeCo Motion for Stay at 8.

only are the PrimeCo owners potential CMRS competitors in markets nationwide, but they are currently competing against each other in a number of markets. For example, Bell Atlantic (through its subsidiary SouthwestCo) and U S WEST are both providing cellular services in areas of Albuquerque, New Mexico, and Phoenix, Flagstaff, and Prescott, Arizona. Requiring existing and potential CMRS competitors to integrate their rates would harm the public interest by depriving customers of the benefits of competitive rate structures.

Moreover, a rate integration rule that requires competing CMRS carriers to share pricing information and to jointly establish an integrated rate structure would raise serious antitrust concerns. It is a *per se* violation of the antitrust laws for competitors to agree on the price they will charge for a service or product. Competitors are also prohibited from exchanging competitively sensitive information such as prices and price-affecting terms (e.g., discounts, rebates, credit terms). Therefore, an overly broad application of the affiliate requirement to PrimeCo and its owners could potentially require them to engage in unlawful price-fixing.[10]

If the affiliate requirement is interpreted in line with the express reasoning behind the rate integration rule, then it is possible that a stay of that requirement

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[10] See § 601(b)(1) of the Telecommunications Act of 1996, 47 U.S.C. § 152 note (b)(1) ("nothing in [the 1996] Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."). In view of the fact that the Commission took it upon itself to impose this broad-based affiliate requirement – even though it was in no way directed by Congress to do so – it is not at all clear that PrimeCo's owners or other "affiliates" would be immune from antitrust liability under a government action immunity defense if price-fixing were alleged as a result of rate integration conduct.

may not be necessary. There are, after all, no hard and fast rules for determining what rate integration means, and a reasonable rate structure can be integrated even if it is not homogenous. The Commission's stated purpose in requiring rate integration across affiliated companies was to prevent carriers from avoiding the rate integration requirement by creating multiple interexchange carrier subsidiaries, each serving a separate geographic area.[11] The Commission did not indicate any intention to require rate integration across independent affiliated companies that, for legitimate business purposes, have a common ownership interest in a licensee. PrimeCo is an excellent example. No one could seriously contend that U S WEST, Bell Atlantic, and AirTouch entered into the PrimeCo partnership to avoid rate integration.

The logical and reasonable interpretation of the affiliate requirement is that the Commission's rate integration rule applies on a licensee-by-licensee basis and that PrimeCo is responsible for integrating interstate interexchange rates only in those markets for which it is the licensee. That is U S WEST's interpretation of the Reconsideration Order, and, therefore, U S WEST does not plan to integrate any of its CMRS rates with PrimeCo's or the other PrimeCo owners' rates. Nevertheless, it is not unreasonable for PrimeCo to seek a stay of the Reconsideration Order until clarification of how rate integration applies to CMRS, if at all, is forthcoming.

[11] Reconsideration Order ¶ 15.

## III. CONCLUSION

For these reasons, the Commission should grant PrimeCo's Motion for Stay (a) of the Reconsideration Order's rate integration rule as applied to CMRS carriers and carriers they own or control, or (b) at a minimum, of the affiliate requirement as discussed in the PrimeCo Motion.

Respectfully submitted,

U S WEST, INC.

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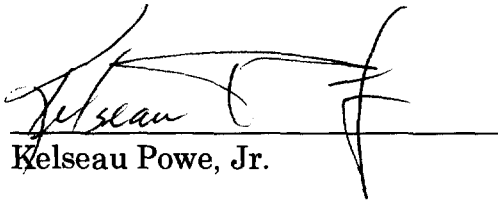
September 29, 1997

## CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 29th day of September, 1997, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served via first-class United States Mail, postage-prepaid, upon the persons listed on the attached service list.



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